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SUPREME COURT, U.S.

NO._____

IN THE SUPREME COURT OF THE UNITED STATES

83-5454

OCTOBER TERM 1982

CLARENCE WOMACK,

PETITIONER

V.

STATE OF ALABAMA,

RESPONDENT

COUNSEL OF RECORD:

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MONTGOMERY, AL 36104

205/262-2719

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

_____ Term, 198____

CLARENCE WOMACK,

Petitioner,

vs.

STATE OF ALABAMA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA AND ALABAMA COURT OF CRIMINAL APPEALS

Petitioner Clarence Womack respectfully prays that a Writ of Certiorari issue to review the judgments of the Alabama Supreme Court and the Court of Criminal Appeals of Alabama in this case.

TABLE OF CONTENTS

1. Questions presented..... 2 and 3

2. Opinions below..... A1-A24, B1-B6

3. Jurisdiction..... 2

4. Constitutional provisions involved..... 3

5. Statement of the case..... 3 and 4

6. Reasons for granting the writ..... 4 through 9

TABLE OF CITATIONS

Code of Alabama, 1975 Sec. 13A-5-31(a)(2)

Enmund vs. Florida, 102 S.Ct. 3368 (1982)

Beck vs. Alabama, 100 S.Ct. 2382, 65 L.Ed 392 (1980).

Beck vs. Alabama, (After remand from United States Supreme Court), 396 So.2d 645(1981)

THE OPINIONS OF THE COURTS BELOW ARE APPENDIXED AS FOLLOWS:

(A) OPINION OF ALABAMA COURT OF CRIMINAL APPEALS

(B) OPINION OF ALABAMA SUPREME COURT

JURISDICTION

The jurisdiction of this Court is being invoked under Title 28 U.S.C. 1257(3).

STATEMENT OF THE ISSUES INVOLVED

1.Did the confession of Petitioner being admitted into evidence meet the constitutional standards required by the United States Constitution?

2. Did the failure of the trial Court to correctly instruct the jury as to aiding and abetting amount to an error of such magnitude as to violate the rights of Petitioner to due process of law?

3. Did the dismissal of the charges against the co-defendant and failure of the Alabama Courts to consider punishment against him amount to the death penalty being unlawfully imposed on petitioner?

4. Does the imposition of the death penalty on this defendant under the circumstances of this case constitute

cruel and inhuman treatment in violation of Amendment Eight to the United States Constitution? (See Attached Addendum)

CONSTITUTIONAL PROVISIONS

1. THE FOURTEENTH AMENDMENT PROVIDES:

> "All persons born or naturalized in the United States ....;nor shall any State deprive any person of life, liberty, or property without due process of law;....."

2. THE EIGHTH AMENDMENT PROVIDES:

> " Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted"

STATEMENT OF THE CASE

1. Your Petitioner was tried in the Circuit Court of Montgomery County, Alabama, upon an indictment charging him with capital murder by violating Section 13A-5-31(a)(2) of the Code of Alabama, a Code Section that no longer exis ed to cover the date on which this offense is said to have been committed.

2. A pretrial Motion was filed and heard wherein your Petitioner attacked the voluntariness of a statement signed by him. The gist of the statement was that he was present when the victim was killed; that one Johnson did the killing; that petitioner did not kill and did not intend to kill.

The evidence at this hearing was that Petitioner could not read and write. One Police Officer had made a notation to the file to the effect "Do not question this man. He does not know what he is signing."

A Psychologist who examined Petitioner testified that Petitioner could not read and write, except his name; that he could not recognize letters of the alphabet.

Petitioner testified that he was handcuffed to a chair and physically abused into signing the statement.

Police Officer Ward, who took the statement from Petitioner denied brutality; he stated Petitioner signed the statement voluntarily; he admitted that he had access to the

file with the notation on it.

The trial Court ruled the statement admissible.

4. In the trial of Petitioner the confession was admitted on behalf of the State and the jury found Petitioner guilty as charged. The jury fixed his punishment at death. The Court in a separate hearing fixed Petitioner's penalty at death.

5. Timely appeal was taken to the Court of Criminal Appeals of Alabama and that Court affirmed by its Case No.3 Div. 567 on the 1st. day of Februay, 1983.

6. After re-hearing was denied by the Court of Criminal Appeals of Alabama on March 1, 1983,the Supreme Court of Alabama granted Petitioner's application for certiorari and affirmed the case on the 8th. of July, 1983, by its case number 82-546. Re-hearing was denied by the Alabama Supreme Court on August 5, 1983. All orders were entered as dated. On the 23rd. of August, 1983, the Alabama Supreme Court made and entered an order fixing punishment of Petitioner at death and setting the time of execution at 12.01 a.m. on September 30, 1983. Application for a stay was denied by the Alabama Supreme Court on the 13th. day of September, 1983.

REASONS FOR GRANTING WRIT

1.

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE STATE OVERCAME ITS BURDEN OF SHOWING THAT THE CONFESSION BY PETITIONER WOMACK WAS FREE AND VOLUNTARY UNDER THE UNITED STATES CONSTITUTION.

It is our position that the confession said to have been made by Petitioner was what led to his conviction and the imposition of the death penalty.

This is asserted because a reading of the entire record will reflect that the other evidence produced by the State came from witnesses totally impeached.

It is fundamental that the presumption is that all statements are involuntary; that the burden is on the State to

carry the burden of proof.

In the case of this Petitioner overwhelming evidence was presented that Petitioner could not read and write, except his name. This was in no way rebutted by the State. The evidence was so strong for the Petitioner to this effect that one Police Officer had notated that Petitioner should not be questioned because he did not know what he was signing.

Expert testimony was adduced by Petitioner in the form of a qualified Psychologist who had examined Petitioner and who testified that he could not read or write. He could not recognize letters of the alphabet.

It was undisputed at the hearing that Petitioner was handcuffed to a chair during the interrogation after which he signed the statement.

The pertinent testimony for the State was by the Officer who took the statement to the effect that it was voluntary; that he was not assigned specifically to the case; that as part of his duties he questioned Petitioner and the statement resulted. He admitted that he had access to the file and the notation.

It is our position that the trial Court erred when it held the statement to be voluntary. We further contend that the appellate Courts of Alabama erred when they upheld the trial Court. We are insistent in this because each of the Alabama Courts totally failed to apply the standard of the presumption of involuntariness and burden of proof as mandated by the Federal Constitution, citing as authority an Alabama case which holds that mental deficiency alone is not sufficient to keep a confession from being admitted, when in fact there was evidence of brutality and that the confession was a prepared one.

The matter of voluntariness of a confession is a most complex matter to say the least.

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER UNDER THE CIRCUMSTANCES OF THIS CASE THE JURY WAS PROPERLY INSTRUCTED ON THE LAW OF AIDING AND ABETTING AND THE RESPONSIBILITY OF ONE WHO IS PRESENT BUT DOES NOT INTEND TO TAKE LIFE.

During the trial of this Case the trial Court charged the jury as follows:

"Now, I have written the word "complicity" down here, and let me explain to you the significance of that. The Defendant, as I have said, is charged with the capital offense of committing a robbery, and while in the course of committing the robbery or attempting to commit a robbery, intentionally killing Arthur D. Bullock. There was testimony in this case that there was more than one person present at Mr. Bullock's store. And when I say there was testimony, I mean only that there was testimony. I don't say that as a fact. You have to determine if those are the facts with regard to somebody else. I'm just saying that there was testimony in the case that there was an accomplice. But that is a fact for you to determine.

The question then comes up how does this relate to Mr. Womack. Can more than one person be guilty of the same offense, and the answer is yes. And I will outline the law to you with regard to that.

Alabama law is a person is legally accountable for the behavior of another constituting a criminal offense if with the intent to promote or assist the commission of the offense, one, he procures, induces, or causes such other person to commit the offense; or, two, he aids or abets such other person in committing the offense. In that regard, just being present at the scene of City Curb Market would not constitute help. Just being there or failing to prevent something from happening, seeing something happening and not preventing it, would not constitute one an aider and abetter. But being there, being ready, willing and able to assist overtly, affirmatively assist either by words or acts or by whatever become necessary to commit that crime, would constitute one, an aider and abetter, and would render him as guilty as if he himself had committed the acts which constitute or comprise the crime."

This is clearly an erroneous charge under the law of Alabama. It was not denied by the Alabama Supreme Court that it was in fact an erroneous charge to the jury. It was not objected to during the stress of the trial.

After the reversal by this Court of the case of Evans Vs. Alabama, the Supreme Court of Alabama was faced with a most serious question of whether the Alabama Death Penalty Act could be made constitutional. In a most carefully written decision the Supreme Court of Alabama in the case of Evans Vs. State, in effect set forth the history of judicial treatment

of death cases. It set forth the powers of the Alabama Courts and the safeguards afforded by the Alabama Courts to an accused where the death penalty had been imposed. The pertinent portion of that decision as it applies to this case is that it cites Rule 39 of the Alabama Rules of Appellate Procedure which permits the Court to consider error whether raised or not, in death cases only.

It is our position that said rule and said ruling fully adopts for Alabama the doctrine of apparent error. The gist of this doctrine of course is that if an error is made which in effect shocks the conscience of the Court then no objection has to be made. Courts in their humane application of the law will apply the correct law whether objected to and raised or not.

What could be a more severe shock to the conscience of any Court that to say to a man that he must die even though the jury which convicted him was incorrectly instructed as to the law?

Certainly due process of law means and requires that a jury be properly instructed.

The instructions to the jury were totally in error on this point.

3.

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER UNDER THE CIRCUMSTANCES OF THIS CASE THE STANDARDS REQUIRED IN A DEATH PENALTY CASE WERE CORRECTLY APPLIED.

A unique thing has happened in this case. Two persons were indicted for capital murder. Petitioner and a man called Johnson. The police had information that both Petitioner and Johnson were involved.

As previously stated Petitioner denies the voluntariness of the statement he signed. But the one page signed statement totally denies that he killed or intended to kill. It says that

Johnson did the killing.

The State introduced evidence by one witness which placed Johnson and Petitioner near the scene of the killling about the time of the killing.

Johnson did not make any statement whatsoever.

The case against Johnson was dismissed by the State. Johnson never had to face trial.

As well as emphasizing the importance that the statement by Petitioner was, this has to do with the punishment rendered a co-defendant as set forth in Alabama's Death Penalty Act.

The Alabama Supreme Court has ruled that in passing on whether or not the death penalty should be upheld by it in a case that one of the standards it must consider is the punishment given a co-defendant.

In this case the trial Court in making his findings as the basis of sentencing Womack to die found that Johnson was with Womack. See: decision of the Court of Criminal Appeals of Alabama to which said findings are attached and made a part.

Can a satisfactory answer be that the State of Alabama does not at this time seek to try Johnson in light of the fact that Johnson was indicted by the same grand jury that indicted Womack? Speedy trial rights run from the time of the indictment.

We point these matters out not to have placed on Johnson the fate which has been decreed to Womack. We point this out because the law says that the punishment of the co-defendant must be considered in passing upon whether to uphold the death penalty against Womack. We contend that there can be no greater difference in treatment than what has happened in this case.

The standards of the Eight Amendment as held by the Supreme Court of the United States in the Case of Enund Vs.

Florida were not applied in this case. In conjunction with the wrongful charge on aiding and abetting; the findings of the trial Court; even the statement vigoriously denied by Womack and other factors show that in this case, Womack, if anything, was an accomplice who did not kill and who did not intend to kill.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

The question of the voluntariness of the confession signed by Womack was raised in the trial Court by pre-trial motion to suppress. It was raised in the Court of Criminal Appeals of Alabama by argument in brief as well as the Supreme Court of Alabama.

The Court of Criminal Appeals ruled with reference to the statement that it was a matter of discretion for the trial Court which would not be disturbed.

The Supreme Court of Alabama affirmed the Court of Criminal Appeals on this issue.

As to the issue of the correctness of the instruction to the jury by the trial Court, the Court of Criminal Appeals held it was not error. The Supreme Court of Alabama held that it was error, but that since Womack did not defend the case upon the ground of being an accomplice that he could not be heard to complain of the charge. The Alabama Supreme Court also held that the doctrine of plain error did not apply.

As to the issue of the death penalty being imposed on Womack contrary to the holding of the Supreme Court of the United States in the case of Enund Vs. Florida, the Court of Criminal Appeals of Alabama held that a non- triggerman accomplice could be guilty of capital murder and suffer death as punishment if, but only if, defendant was an accomplice to the intentional killling. The Supreme Court of Alabama, as we understand its decision, did not elaborate, but said that the evidence was sufficient.

As to the issue of treatment of the co-defendant, the Court of Criminal Appeals and the Supreme Court of Alabama both held it made no difference that the case against the accomplice was dismissed.

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Petition on the Attorney General of Alabama by causing a copy of the same to be hand delivered to his Office on this 22 day of September, 1983, and I further certify that all persons or parties required to be served have been served.

Maurice S. Bell
MAURICE S. BELL

STATE OF ALABAMA *

MONTGOMERY COUNTY *

Before me, the undersigned Notary Public in and for said State and County, personally appeared Maurice S. Bell, trial counsel at the State level, who being duly sworn, deposes and says that the matters and things stated in the petition for writ of certiorari are true and correct as stated to the best of his knowledge, information and belief.

Maurice S. Bell
Maurice S. Bell

Sworn to and subscribed before me this 22 day of September, 1983.

Notary Public

A D D E N D U M

ADDITIONAL GROUNDS FOR GRANTING THE WRIT

5. An eye witness was a Mrs. Mattie Hunt who testified at the trial that she saw the Defendant at the scene of the killing as he was walking in and she was walking out. She stated the Defendant was clean shaven. A few days later, she was escorted to a live line up after first being shown a single photographic picture of the Defendant. At the trial Mrs. Hunt made an in Court identification of the Defendant who was the only black male seated at both counsel tables. Evidence introduced at trial revealed that the Defendant's attorney and a private investigator (formerly a police officer) questioned Mrs. Hunt on July 27, 1981 at her residence for approximately 45 minutes. The defense attorney asked Mrs. Hunt had she ever seen the defense attorney at any time and she replied "NO". The private investigator also testified and confirmed the above.

6. Rex Jones, oft convicted felon testified against the Defendant. He stated that Womack in the presence of Johnson said that he (Womack) and Johnson shot the victim. Testimony revealed that Rex Jones was a convicted felon presently incarcerated for robbery and at the time of trial was awaiting sentencing for four additional robberies pending his testimony in this matter. He was interrogated for complicity in this matter immediately after the killing and placed the guilt on the defendant and co defendant.

There were many glaring inconsistencies in Rex Jones' testimony, three of which were very important:

(a) He stated Womack had a beard the day of the killing and Mrs. Hunt stated the Defendant was clean shaven.

(b) Rex Jones stated that he and Neil Martin saw Defendant Womack and Charles Johnson a few minutes after the shooting, but, Neil Martin stated he had not.

(c) Rex Jones stated he burned Neil Martin on his arm with a cigarette three times while in custody. Evidence revealed that these two individuals were never in the same cell. Evidence further revealed that Neil Martin had two burns and he stated that R. T. Ward, a police investigator, burnt his arm with a cigarette to induce him to support Rex Jones' testimony.

7. The deceased was shot by a bullet from a 32 caliber pistol. Approximately four months later, this same gun was used in a robbery attempt wherein that victim was injured, but recovered. The Defendant could not be involved in the laten